## Explanation/Format

This activity simulates part of a debate about the Knowing China Critique. The format of the debate is as follows:

1AC = below — assumed, not read

CX of 1AC = 2 minutes

1NC = read the 1NC, not timed (no additions/subtractions)

CX of 1NC = 2 minutes

2AC = from the materials in the Knowing China file, put together a 2AC that uses no more than 4 cards and 6 analytical arguments

CX of 2AC = 2 minutes

2NC = 5 minutes

CX of 2NC = 2 minutes

1AR = 1.5 minutes

2NR = 3 minutes

2AR = 2.5 minutes

Students should make use of the Knowing China Critique file. The Security K file might also be useful.

All debaters will prepare each speech and then we will select a student to give the speech. We may hear additional speech(es) along the way for practice.

## 1AC

### 1AC — Relations Advantage (South China Sea)

#### Contention One — Relations:

#### In negotiations over a Bilateral Investment Treaty, China seeks CFIUS reforms. But, the US won’t change its stance in the status quo.

Moran ‘15

Dr. Theodore H. Moran holds the Chair in International Business and Finance at the School of Foreign Service, *Georgetown University*, where he teaches and conducts research at the intersection of international economics, business, foreign affairs, and public policy. Dr. Moran is founder of the Landegger Program in International Business Diplomacy, and serves as Director in providing courses on international business-government relations and negotiations. Dr. Moran is consultant to the United Nations, to diverse governments in Asia and Latin America and received his PhD from Harvard. “Chinese Investment and CFIUS: Time for an Updated (and Revised) Perspective” - Policy Brief: NUMBER PB15-17 – Peterson Institute for International Economics – September - https://piie.com/publications/pb/pb15-17.pdf

For more than a decade, China has complained about what it maintains has been a pattern of erratic and politicized treatment of Chinese investors when they attempt to acquire US companies- Chinese authorities remain stung in particular by the political backlash in Washington provoked in 2005 when the China National Offshore Oil Corporation (CNOOC) attempted unsuccessfully to acquire the American oil company Unocal. Although the deal was aborted by politics, and not any official finding of security concerns, the Chinese have targeted the Committee on Foreign Investment in the United States (CFIUS) as a focus of their criticism. The Chinese want the committee, an interagency group that reviews foreign acquisitions of US companies for possible threats to the national security of the United States, to be more open and transparent in its rulings and to not discriminate against Chinese firms but instead treat Chinese acquisitions on an equal basis in comparison with acquisitions by firms of other nationalities. The United States is not likely to accede to the Chinese demands in any formal or legal manner. In a world of geopolitical tensions, acquisitions by firms from potential adversary countries will inevitably receive disproportionately intense scrutiny. Assessments by US intelligence agencies will remain secret so as not to reveal "sources and methods." Discussions with the Chinese about addressing their demands have been a major part of negotiations on a bilateral investment treaty (BIT), but as of September 2015, progress on the issue has stalled despite efforts to complete agreement at the time of the visit of President Xi Jinping to Washington and Seattle. It has become increasingly apparent that the United States is not prepared to change CFIUS's substantive procedures as China wants.

#### Absent change, US-Sino ties will spiral to great power conflict in the short-term – a BIT is *the most important variable* to solve.

Zhang ‘15

Chin Chin Zhang is a M.A. candidate for International Trade & Investment Policy at George Washington University's Elliott School of International Affairs in 2016. Her study integrates the political, economic and financial dynamics of global currents, with regional focuses on the United States, European Union and China. She worked in the financial services industry while earning her B.S. in Applied Mathematics from University of California-Los Angeles – From the article - “In Response: Simple Ingredients for the Sino-American Partnership” - International Affairs Review - Volume XXIII, Number 3 • Summer 2015 – available at: http://www.iar-gwu.org/sites/default/files/articlepdfs/China%20Special%20Issue%20DOC%20C%20-%2003%20Simple%20Ingredients%20-%20Zhang.pdf

Whenever interests between states get convoluted, scholars seize the opportunity to march ambitiously toward long-term relationship-building. They do so under the assumption that the best way to avoid great-power conflict is by emphasizing mutual interests in the long run. Unfortunately, too forward-looking an approach can easily diverge from the core issues at present, yielding ankle-deep analyses, biased standpoints, and vulnerable arguments. Florick and Cronkleton's "Remapping China-United States Relations" offers hopeful cooperative ventures rather than pragmatic solutions to prevent a negative spiral in Sino-American relations. The authors fashion opportunities for collaboration in the defense and social realms to diversify the existing economics-heavy approach and to reduce mistrust. Yet the measures put forward by the authors do not factor in Beijing's perspective and often demand total concession from China. Despite their optimistic vision across defense, economic, and social issues across different timeframes, the authors fail to acknowledge China's strategic priorities. In radical contrast to the well-briefed U.S. strategic priorities from the 2015 National Security Strategy, China's strategic priorities are only "broadly spoken" as to "defend sovereignty, maintain territorial integrity and support development" - a very incomplete summary. China's latest national security document states Chinese diplomatic priorities as, in order of importance: "Collaborate with Russia (Kflfe), Attract the EU (fegfc), Calm the US. The strategy identifies China's top national security concern as "the U.S.-led Western attitude on China's domestic policies, territorial dispute and ocean rights."2 The low priority assigned to the United States on China's diplomatic agenda contrasts with its top position as a defense priority. This evidences Beijing's defensive stance toward a distrusted Washington, a stance that cannot be addressed by merely peripheral mutual interests. First and foremost, ongoing terrorism and territorial disputes challenge both nations' priorities. For China, sovereignty issues reign supreme, while the United States is more concerned with terrorism and the stability of the international order. Florick and Cronkleton argue that China should join counter-terrorism operations against the Islamic State of Iraq and al-Sham (ISIS), reasoning that Beijing may face a direct future threat from returning fighters. The scenario is not far-fetched, as Beijing was informed by Israel last year that about a thousand Uighurs had joined ISIS.3 Yet China will have little interest in cooperative counter-terrorism efforts until the threat manifests - and may believe that cooperating with those very efforts will make it an immediate target. In August 2014, President Obama labeled China a "free-rider" in the Middle East.4 To the Chinese public, such a label exaggerated China's economic prowess and downplayed Beijing's contribution in the post-war reconstruction effort in Iraq. Regardless of Obama's true intention-perceived disrespect is enough to insulate trust. To move forward. Washington could initiate an open conversation with Beijing, express hopes of further cooperation in the Middle East, recognize China's past contributions in the region, and offer future cooperation on combating terrorism aimed at China. Similar problems plague the authors' identification of Chinese territorial disputes for short-term resolution possibilities. The authors suggest establishing a "quota system for naval and aerial incursions and a moratorium on personnel landings on the disputed territories off China's coast." This is an entirely U.S.-centric view absent recognition of China's historical governance of the South China Sea that dates back to 210 BC a fact that equals "effective governance" under international law.6 No other issue is more pertinent to Chinese sovereignty than the South China Sea dispute. If the United States desires shared leadership with China, it should maintain a neutral position on South China Sea issues to avoid unnecessary damage to mutual trust. In contrast to the defense and political spheres, economic factors are so far the most-developed aspect of the U.S.-China relationship. Massive trade flows already bond the two parties' interests despite disputes in other arenas. The authors caution against weighting the relationship too heavily toward economic ties, but fail to realize that bilateral trade and investment issues hold the greatest potential for mutually beneficial partnership opportunities. Moving forward, both parties need to constantly adjust public-private dynamics to better meet market needs and accommodate firms from the other state within relevant legal frameworks. In the outlook for trade and investment, two general challenges remain, the larger of which is protectionist policies. The authors suggest that the United States and China "increase transparency and openness in business-government relationships and lift protectionist tactics in the interests of cooperation and building good will." This echoes the current trend in Sino-American relations. A Bilateral Investment Treaty (BIT), initiated in June 2014 and completed in March 2015, agrees to provide protections for the other country's foreign investors.7 If the BIT transitions from paper to reality, China will attract increased foreign direct investment and reduce its heavy reliance on manufacturing exports and debt-financed investment, while the United States could further penetrate the Chinese market and even gain early stakes in a liberalized financial market envisioned in Xi's reform agenda. The United States needs to smooth concerns over its loss of domestic employment, while China needs to take serious measures to ensure fairness to foreign investors with the exact set of rules and protections agreed upon in the BIT.

#### Relations are nearing a tipping point - US-Sino ties are key to *check military encounters*, *coop on transnational issues*; and *economic welfare in both nations*.

Lampton ‘15

Dr. David M. Lampton is The Director of China Studies at the Johns Hopkins Paul H. Nitze School of Advanced International Studies (SAIS) and Chair of The Asia Foundation. *In January 2015 Lampton was named the most influential China watcher by the Institute of International Relations at the China Foreign Affairs University in Beijing. Researchers chose him after assessing the credentials of 158 top China experts.* Lampton is the Former President of the National Committee on United States-China Relations and is currently a member of the National Committee on U.S.-China Relations Executive Committee and a member of the Council on Foreign Relations. He received his B.A., M.A., and Ph.D. degrees from Stanford University. This is a transcript of Dr. Lampton’s speech titled: “A Tipping Point in U.S.-China Relations is Upon Us” as given at the conference “China’s Reform: Opportunities and Challenges.” This event was co-hosted by The Carter Center and the Shanghai Academy of Social Sciences over May 6-7, 2015. Available via the US-China Perception Monitor - http://www.uscnpm.org/blog/2015/05/11/a-tipping-point-in-u-s-china-relations-is-upon-us-part-i/

Today, soon after May 4th and in the context of the 70th anniversary of the end of WWII, the question is whether or not America and China can, again, find such vision and leadership in today’s far different circumstances. My purpose in the frank remarks to follow is not to depress or offend, but rather to motivate all of us to push events in a better, more mutually beneficial direction. My spirit is at one with Minister Li’s exhortation that we “amplify what we have in common.” For eight U.S. and five Chinese administrations, Washington and Beijing maintained remarkable policy continuity—broadly speaking, constructive engagement. This continuity has persisted despite periodic instabilities, problems, and crises. Some of these developments required time, flexibility, and wisdom to heal. They sometimes left scar tissue. But, none of these challenges ever destroyed overall assessments in both our nations that we each had fundamental, shared interests requiring cooperation and that the costs of conflict outweighed possible gains. Assessments of relative power in both countries for much of the last four decades created few incentives in either society to rethink fundamental policy. Chinese seemingly were resigned to “live with the hegemon,” as one respected Chinese professor put it, and Americans were secure in their dominance and preoccupied with conflicts elsewhere. After the 9/11 attacks on America, China was seen as non-threatening, indeed willing to use some of its resources in the “War on Terror.” In a reflective moment after the 9/11 attacks, then Ambassador to China Sandy Randt delivered a speech to Johns Hopkins–SAIS in which he said, “We have seen the enemy, and it is not China.” In the economic realm, expectations for growth in each society created common interests that subordinated many underlying frictions, whether economic or human rights. The positive balance between hope and fear tipped behavior toward restraint and patience. Things unfortunately have changed dramatically since about 2010. The tipping point is near. Our respective fears are nearer to outweighing our hopes than at any time since normalization. We are witnessing the erosion of some critical underlying supports for predominantly positive U.S.-China ties. Though the foundation has not crumbled, today important components of the American policy elite increasingly are coming to see China as a threat to American “primacy.” In China, increasing fractions of the elite and public see America as an impediment to China’s achieving its rightful international role and not helpful to maintaining domestic stability. Former Australian Prime Minister Kevin Rudd put it well, characterizing the narrative of an unidentified Chinese Communist Party document [perhaps the new National Security Blue Book], and analogous American thinking, in the following terms: “In Beijing’s eyes the U.S. is deeply opposed to China’s rise … American strategy toward China, it said, had five objectives: to isolate the country, contain it, diminish it, divide it, and sabotage its political leadership.” The American narrative, as Rudd described it, is hardly more positive about Beijing: “Beijing’s long-term policy is aimed at pushing the U.S. out of Asia altogether and establishing a Chinese sphere of influence spanning the region.”[1] Since about 2008, there has been a sequence of regional and global developments and incidents that have provided fertile soil in which these negative narratives have grown in each of our societies. Among them are: the 2008 financial crisis, incidents in Hong Kong, developments in the south and east China seas, U.S. inability to quickly exit Middle Eastern and Central Asian quagmires, and the confusion in America and elsewhere about where China is headed internally and in terms of its foreign policy. Current Chinese debate over western (universal) values, subversion, and “black hands” unsettles most outside observers, not least Americans. What is happening? If developments continue along the current trajectory, both countries will have progressively less security, at higher cost; the probabilities of intentional, accidental, or catalytic violent confrontations will increase; the world will enjoy less cooperation on transnational issues requiring joint Sino-American efforts; and, economic welfare in both societies will be diminished. What can be done?

\*\* insert impact module(s) here. Options begin on the next pages.

#### US-Sino ties key to de-escalate tensions in the *South China Seas*. A B.I.T. is the best step for relations.

Shambaugh ‘15

David Shambaugh is a professor of political science and international affairs at the George Washington University, as well as a non-resident senior fellow at the Brookings Institution. David is regarded inside and outside China as an authority on China's foreign policy, military and security issues and Chinese politics, and has been cited in the state media. He is a regular media commentator, and has acted as an advisor to the United States government and several private foundations and corporations. He was formerly the editor of the China Quarterly, and is a member of the Council on Foreign Relations –“Sino-US relations: Divorce is not an option” – Straits Times - June 12th - http://www.straitstimes.com/opinion/sino-us-relations-divorce-is-not-an-option

Despite this overall macro climate in the relationship, the US and China still have to coexist, and to do so peacefully if at all possible. We have business to do with each other - both commercial and diplomatic business. Perhaps the most immediate opportunity - and one that would give an enormous boost to the relationship - would be the conclusion of a bilateral investment treaty. But negotiating this treaty is hung up in the queue behind the Trans-Pacific Partnership agreement. Given the difficulty the White House is having getting that agreement finalised and through Congress, there may be little appetite in Washington to conclude an investment treaty with China this year. Also high on the agenda at present is the real need to forge practical cooperation on a number of so-called "global governance" issues, including North Korea, Iran, the Islamic State in Iraq and Syria, Afghanistan, counterterrorism, anti-piracy, climate change, maritime security, economic stability, energy security, sea-lane security, and setting global rules for cyber activity. To date, China has been extremely reluctant to collaborate openly with the US on such global governance issues, but now it possibly seems more feasible. This is because President Xi has personally endorsed more "proactive diplomacy" by China in the global governance arena. This will not solve the problems in US-China relations, but it will help. The upcoming Strategic and Economic Dialogue and Mr Xi's September state visit to Washington are golden opportunities to discuss these issues, try to forge tangible cooperation, and arrest the negative dynamic in the relationship. The question is whether it will be temporary again, or a real "floor" can be put beneath the relationship. If the past is any indicator, we should not expect too much. What worries me is that in this increasingly negative and suspicious atmosphere, "tests of credibility" will increase. The best we can probably hope for over the next two to three years - as President Obama becomes a lame duck and the election cycle stimulates more heated rhetoric about China - is tactical management of the relationship, with sensitivity to each side's "red lines" and "core interests", while hoping that no "wild card" events occur. This could include another military incident in the air or at sea, or renewed tension over Taiwan. Even the current situation in the South China Sea has real potential to haemorrhage, as China is not going to stop its island- building activities and hence will not meet American demands that it do so. Or if China, having fortified the islands, proclaims an air defence identification zone over the South China Sea. What is Washington to do then? The potential for military confrontation is not insignificant. So, looking to the future, the key responsibility for both countries is to learn how to manage competition, keep it from edging towards the conflictual end of the spectrum, while trying to expand the zone of practical cooperation.

#### SCS conflict causes huge death tolls.

Wittner ‘11

(Lawrence S. Wittner, Emeritus Professor of History at the State University of New York/Albany, Wittner is the author of eight books, the editor or co-editor of another four, and the author of over 250 published articles and book reviews. From 1984 to 1987, he edited Peace & Change, a journal of peace research., 11/28/2011, "Is a Nuclear War With China Possible?", [www.huntingtonnews.net/14446](http://www.huntingtonnews.net/14446))

While nuclear weapons exist, there remains a danger that they will be used. After all, for centuries national conflicts have led to wars, with nations employing their deadliest weapons. The current deterioration of U.S. relations with China might end up providing us with yet another example of this phenomenon. The gathering tension between the United States and China is clear enough. Disturbed by China’s growing economic and military strength, the U.S. government recently challenged China’s claims in the South China Sea, increased the U.S. military presence in Australia, and deepened U.S. military ties with other nations in the Pacific region. According to Secretary of State Hillary Clinton, the United States was “asserting our own position as a Pacific power.” But need this lead to nuclear war? Not necessarily. And yet, there are signs that it could. After all, both the United States and China possess large numbers of nuclear weapons. The U.S. government threatened to attack China with nuclear weapons during the Korean War and, later, during the conflict over the future of China’s offshore islands, Quemoy and Matsu. In the midst of the latter confrontation, President Dwight Eisenhower declared publicly, and chillingly, that U.S. nuclear weapons would “be used just exactly as you would use a bullet or anything else.” Of course, China didn’t have nuclear weapons then. Now that it does, perhaps the behavior of national leaders will be more temperate. But the loose nuclear threats of U.S. and Soviet government officials during the Cold War, when both nations had vast nuclear arsenals, should convince us that, even as the military ante is raised, nuclear saber-rattling persists. Some pundits argue that nuclear weapons prevent wars between nuclear-armed nations; and, admittedly, there haven’t been very many—at least not yet. But the Kargil War of 1999, between nuclear-armed India and nuclear-armed Pakistan, should convince us that such wars can occur. Indeed, in that case, the conflict almost slipped into a nuclear war. Pakistan’s foreign secretary threatened that, if the war escalated, his country felt free to use “any weapon” in its arsenal. During the conflict, Pakistan did move nuclear weapons toward its border, while India, it is claimed, readied its own nuclear missiles for an attack on Pakistan. At the least, though, don’t nuclear weapons deter a nuclear attack? Do they? Obviously, NATO leaders didn’t feel deterred, for, throughout the Cold War, NATO’s strategy was to respond to a Soviet conventional military attack on Western Europe by launching a Western nuclear attack on the nuclear-armed Soviet Union. Furthermore, if U.S. government officials really believed that nuclear deterrence worked, they would not have resorted to championing “Star Wars” and its modern variant, national missile defense. Why are these vastly expensive—and probably unworkable—military defense systems needed if other nuclear powers are deterred from attacking by U.S. nuclear might? Of course, the bottom line for those Americans convinced that nuclear weapons safeguard them from a Chinese nuclear attack might be that the U.S. nuclear arsenal is far greater than its Chinese counterpart. Today, it is estimated that the U.S. government possesses over five thousand nuclear warheads, while the Chinese government has a total inventory of roughly three hundred. Moreover, only about forty of these Chinese nuclear weapons can reach the United States. Surely the United States would “win” any nuclear war with China. But what would that “victory” entail? A nuclear attack by China would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a “nuclear winter” around the globe—destroying agriculture, creating worldwide famine, and generating chaos and destruction.

### 1AC — Protectionism Advantage

#### Contention Two — Protectionism:

#### *Vague CFIUS definitions* and *bilateral arm twisting* cause a global chain reaction. That sparks international protectionism. Modifying US policy can reverse this trend.

Georgiev ‘8

George Stephaiiov Georgiev – The author holds a JD from Yale Law School – received in June of 2007. Georgiev also holds an M.A. in Economics from the University of Munich and a B.A., summa cum laude, in Economics and International Relations from Colgate University. During law school, Georgiev served on the Yale Journal of International Law and as a Yale College Teaching Fellow, and was awarded an Olin Summer Research Fellowship in Law, Economics, and Public Policy and a Howard M. Holtzmann Fellowship. - “The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security” - Yale Journal on Regulation, Vol. 25, 2008 - Modified for potentially objectionable language – available for download at: http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1282197

The frequent political opposition to foreign acquisitions can be driven not only by genuine national security concerns, but also by protectionist impulses. Consequently, the regulatory regime that is in place strives to pay due attention to the former and to filter out the latter, all within the framework of keeping the United States open to foreign investment. Success in achieving this goal depends on several specific choices made in the design of the mechanism for reviewing transactions. As a starting point, the review process is likely to yield different results depending on whether the primary oversight responsibility lies within the executive branch or is shared with Congress or the courts. Furthermore, the U.S. framework has a significant impact on other jurisdictions’ regulatory posture with regard to foreign investment. If the United States is seen as using national security review to engage in protectionism, this could provoke a protectionist backlash in other parts of the world and hurt U.S. companies. Similarly, other jurisdictions could take advantage of inadequacies in the U.S. regulatory regime and divert foreign investment away from the U.S. economy through more liberal laws.5 The Foreign Investment and National Security Act of 2007 (the Act), 6 which was signed into law on July 26. 20077 and went into effect on October 24, 2007, is the latest effort to modify and update the regulatory framework governing the foreign acquisition of U.S. companies. This Comment describes the most important changes introduced by the Act and evaluates the extent to which the updated legislation strikes a reasonable balance between addressing national security concerns and maintaining the openness of the U.S. economy. I. The Structure of CFIUS Review The origins of the current regulatory system can be traced back to 1975, when President Gerald Ford created the Committee on Foreign Investments in the United States (CFIUS), an interagency body within the executive branch chaired by the Department of the Treasury. The Department of the Treasury originally tasked CFIUS with monitoring the impact of inbound foreign investment and coordinating U.S. investment policy. The President's power to act in this domain was formalized by the International Investment Survey Act of 1976.9 In the 1980s, mounting concerns over the acquisition of U.S. firms by Japanese and British investors prompted Congress to introduce a system of formal review of these transactions through the Exon-Florio Amendment to the Defense Production Act of 1950.10 The Amendment authorized the President to investigate the effect of foreign acquisitions on U.S. national security and. acting based on "credible evidence." to suspend or prohibit acquisitions that might threaten national security.11 Prior to the Amendment, foreign acquisitions could be blocked only if the President declared a national emergency or regulators found a violation of federal antitrust, environmental, or securities laws. Congress acted again in 1992, adding a statutory requirement for CFIUS to carry out mandatory investigations of transactions where the acquirer is "controlled by or acting on behalf of a foreign government," and "seeks to engage in an acquisition that could affect the national security of the United States.'"12 The regulatory regime was developed further through a series of Executive Orders13 and Department of the Treasury implementing regulations.14 CFIUS presently has twelve members, including the Secretaries of State, the Treasury, Defense. Homeland Security, and Commerce: the U.S. Trade Representative: the Chair of the Council of Economic Advisers; the Attorney General: the Directors of the Office of Management and Budset and of the Office of Science and Technology Policy: the Assistant to the President for National Security Affairs: and the Assistant to the President for Economic Policy.15 The process of CFIUS review can begin either with a voluntary notice from a party to a potential transaction or on recommendation from a CFIUS member agency that believes a given transaction might affect U.S. national security.16 In practice, however. CFIUS has not initiated reviews but has instead encouraged parties to not-yet-notified sensitive transactions to file a notice voluntarily.17 Neither the statute nor the implementing regulations provide a definition of "national security," but they do contain a non-exhaustive list of factors that may be considered when determining whether a threat to national security exists. These factors include domestic production needed for projected national defense requirements, the capability and capacity of domestic industries to meet national defense requirements, the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet national security requirements, the potential effects of an acquisition on sales of military goods, equipment, or technology to countries supporting terrorism or raising proliferation concerns, and the potential effects on U.S. technological leadership in areas affecting national security.18 Even though the 2007 amendments responded to several points of criticism, they did not change the core structure of the CFIUS process. Currently, after it receives notice of an acquisition, CFIUS may begin a thirty-day review to determine whether the transaction could pose a threat to national security.19 At the end of this period, the Committee may conclude that no such threat exists and end the review, or it may commence a forty-five-day investigation. Upon the conclusion of the investigation, the Committee is required to submit a report to the President containing its recommendations.20 Within fifteen days, the Office of the President may suspend, prohibit, or order certain modifications to the transaction through a mitigation agreement, or it may permit the acquisition by not taking any action. Regardless of the outcome, it must submit a report to Congress explaining its decision.21 This structure resembles the two-stage merger review process under the Hart-Scott-Rodino Act of 1976." but understandably involves much less transparency given the sensitive nature of national security information. For this reason, and also because the executive's findings are not subject to judicial review, the confidence in the Hart-Scott-Rodino regime cannot be automatically transposed onto the CFIUS framework. The main benefit of a voluntary CFIUS filing for companies is that any notified transaction with potential national security implications enjoys a regulatory safe harbor, immunizing it against subsequent reviews or actions by the President except in cases where the parties have engaged in misrepresentations during the CFIUS process.25 In contrast, a transaction without a voluntary filing with CFIUS that subsequently raises national security concerns can be reviewed and unwound by the President at any time, even long after closing. Another benefit of filing involves the opportunity for informal guidance whereby the regulator and the company discuss the adequacy of the filing and the expected shape of the CFIUS process. Although such guidance can help companies to provide relevant information and not waste resources on a transaction that is unlikely to be approved, the dialogue between the regulator and companies has halted in the aftermath of the DP World controversy." Most criticisms of the CFIUS review process have been prompted by the high-profile acquisitions of the past few years. Prominent among the criticisms was the view that because CFIUS is chaired by the Department of the Treasury, economic concerns would prevail over national security concerns. Furthermore, the definition of "national security" was sometimes interpreted too narrowly and the list of factors used to evaluate national security threats was viewed (considered) as too vague. There have been arguments to include "energy security" or even "economic security" as part of that definition. Finally. Congress has complained that the review process is not sufficiently transparent and that the White House has taken a hands-off approach, resulting in reviews that are not sufficiently detailed.26 When evaluating these criticisms, it is important to remember that the number of foreign acquisitions that require CFIUS review is very small and that the potential for harm in the form of negative business attitudes towards U.S. firms abroad is disproportionately large. For example, among the over 1500 notices filed with CFIUS between 1988 and 2005. the Committee found it necessary to open an investigation in only twenty-five cases. After investigation, thirteen proposed transactions were withdrawn, while twelve transactions were sent to the White House.28 The President has used the authority to block a transaction only once, in 1990.29 Even assuming that the withdrawn transactions would have resulted in a prohibition, problematic transactions would still comprise less than one percent of all notified transactions. The transactions which CFIUS needed to investigate comprise only two percent of the total number of notified transactions. It should also be remembered that ex ante control of foreign acquisitions is not the only way to ensure that such transactions do not threaten national security. Problems can certainly arise outside of a change of corporate ownership or control and. consequently, there should be appropriate mechanisms for detecting and remedying such problems. The CFIUS process should be seen as a small complement to more comprehensive monitoring mechanisms and not as a tool that can address national security concerns all by itself. Filially, it is helpful to bear in mind that unsubstantiated alarmist statements could originate from parties that are not unbiased or disinterested, e.g.. politicians representing domestic constituents with economic stakes, or spurned bidders who would benefit directly if a transaction falls through. The possibility that foreign acquisitions could be threats to national security is a serious one, but it should not become a pretext for the stealth promulgation of policies in other areas, or for the defense of labor, environmental, and industrial special interests. The importance of striking an appropriate balance between openness to foreign investment and the protection of national security is highlighted by two emerging trends. First, sovereign wealth funds have come to play a larger and more visible role in the global market for investment and then targets frequently include U.S. companies. Second, the increased interplay between the regulatory frameworks of countries seeking to attract foreign investment suggests that the CFIUS regime can have unintended international effects. The global marketplace has seen the emergence of a new investor type— sovereign wealth fluids that are either directly or indirectly controlled by national governments.30 As recent transactions have shown, the prototypical new purchasers of major assets, such as a British groceiy store chain (Sainsbury's). large blocks of shares in global banks (Barclays and Citigroup), or a U.S. stock exchange (NASDAQ) are government-controlled Chinese companies and the sovereign investment fluids of petrol-rich Gulf states.31 The substantial depreciation of the U.S. dollar in 2007 " has made U.S. assets much cheaper for foreign-based entities, be they governments, companies, or individual investors. Domestic politicians may view some of these entities with suspicion, but the capital inflows they bring are needed for the continued economic strength of the United States. On a more global scale, the modifications and the ongoing performance of the framework regulating foreign investment in the United States are closely monitored by other countries and could well set the tone for the degree of openness to such investment worldwide. In recent years, a number of jurisdictions have begun establishing CFIUS-style bodies or procedures, including major U.S. trade partners, such as China.35 Canada.54 Germany.35 and the European Union. Maintaining attractiveness to foreign investment therefore requires a relative assessment that compares the domestic CFIUS framework with those of other recipient countries. Some countries view the U.S. regime as unnecessarily onerous and could attempt to create more investment-friendly frameworks that would divert foreign investment away from the United States. Others, such as China, could use national security review as a pretext for blocking U.S. purchases of domestic assets, or at least for raising their cost. Finally, the increased prevalence of arguments that use the concept of "national industrial policy" could work to strengthen the protectionist tendencies that already exist in certain European countries.37 Even in cases where the regulatory regimes do not differ formally, the cost of generating negative publicity through politicization can be substantial. In the case of DP World, for example. CFIUS approved the acquisition through its regular review process, but members of Congress and other political and economic actors criticized and ultimately unraveled part of the transaction by forcing the sale of DP World's U.S. assets. Analysts have suggested that as a result of this episode, foreign investment in the United States originating from the United Arab Emirates alone fell by over $1 billion in 2006.38

#### China mirrors US CFIUS enforcement. Stricter Chinese policies make *global protectionism* and *economic decline* inevitable.

Bu ‘12

Qingxiu Bu – PhD and Professor in Law, Centre of Transnational Legal Studies, *Georgetown University* -- “China's National Security Review: a tit-for-tat response ?” - Law and Financial Markets Review, vol 6:5, pps. 343-356 – obtained via the Taylor & Francis Database

The Huawei case represents another high-profile rejection of Chinese acquisitions on national security grounds. The unsuccessful transaction may not indicate general hostility to Chinese investment. It shows CFIUSs interest in protecting critical technology within the context of its broad mandate of national security.71 Huawei—3Leaf reveals a starkly different philosophy about risk management between China and the West. Chinese management normally show substantial flexibility which enables them to take advantage of regulatory grey areas. This kind of strategy, reflected in Huawei' borderline approach, resulted in CFIUS unwinding the deal retrospectively. The West takes a bright-line rule approach, ie CFIUS must reject a deal if the transaction presents any national security risks which cannot be mitigated. From a governance perspective, Huawei 3Leaf indicates that it is of paramount importance for Huawei to integrate the national security implications into its general cross-border expansion scheme. This episode serves as a reminder to Chinese SWF-based investors of the perils they may face if ill-prepared for the CFIUS review process,72 and also highlights the utmost significance for them to conduct regulatory and political risk due diligence prior to entering into a transaction. The rejection of the Huawei-3Leaf transaction might be interrelated as part of a broader protectionist shift in US investment policy under the FINSA 2007 umbrella. It is argued that Congress might have interfered in the deals under the pretext of national security.73 CFIUS exercises broad and vague discretion to assess national security on a case-by-case basis, which may result in inconsistent interpretations. This precipitates an increasingly unpredictable atmosphere for FDI in the US. The two cases highlight the necessity to balance legitimate national security concerns with the importance of domestic economic growth and development.74 Ideologically, the US's safeguarding measures are likely to have a great influence upon how China will shape its own foreign investment regulations and procedures.75 After all, China has long been mirroring the US's operational models in most sophisticated legislative reforms and judicial practice. The continually perceived use of the CFIUS as a tool of economic protectionism could lead to retaliation in the form of restriction of US foreign investment.76 If the US is seen as using national security review to engage in protectionism, this could provoke a protectionist backlash.77 China may view the US's actions in CNOOC—Unocal as a hostile attempt to prevent Chinas overseas expansion. There is concern that such protectionist actions would lead to a form of legalised isolationism in China.78 As it was openly alleged: "[I]f an economy will use national security as a [criterion] for entry of sovereign wealth funds, we will be reluctant to tap the market because you are not sure what will happen ... national security should not be an excuse for protectionism."79 Given the perceptions of broader protectionism that the rejection of an individual deal can foster,80 it is worth examining whether China's newly established NSR system could be considered a tit-for-tat reaction. China’s national security considerations are embedded in a complex regime and are currently entrenched in an additional opaque level of regulatory review.81 With the substantial increase in cross-border M&As, China has launched a long-anticipated state-level NSR mechanism for the purpose of regulating inbound M&As in sensitive industries. A multi-ministry panel has been established and jointly headed up by the National Development and Reform Commission (NDRC) and MOFCOM. An NSR can be initiated by the relevant government agencies or within the upstream or downstream industries of the target.82 As the gatekeeper for referring deals to the NSR Panel, MOFCOM liaises with relevant entities to obtain necessary details. Additional government agencies with close relevance to a particular acquisition will be involved in participating in the NSR Panel on an ad hoc basis.83 For each transaction, a "lead agency" with the greatest interest or expertise in the matter is designated to conduct most of the review and report back to the panel.8'1 Third parties may refer to MOFCOM any transaction for which they deem NSR necessary.85 If the panel concludes that the transaction may affect national security, it will request that MOFCOM and other agencies take the appropriate measures to eliminate such impact, such as by ordering the termination of the transaction or directing transfer of shares or assets. There has been a general trend for China to move towards a more expansive review of national security. The newly established NSR regime consists of hard law associated with initiatives from both MOFCOM and the State Council. The comprehensive approaches set out a more detailed mechanism for a review on national security grounds and, to some extent, provide a degree of clarity and certainty to foreign investors in cross-border acquisitions. (a) Comprehensive regulatory framework The regime can be traced back to 8 August 2006, when MOFCOM promulgated the Rules on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (the "M6VAs Rule"). This represents the first time that MOFCOM called for notification and review of an inbound M&A transaction that might have an impact on Chinas "national economic security". The most relevant provision for NSR is Article 12, which requires the parties concerned apply for approval from MOFCOM when an acquisition of a domestic enterprise by a foreign investor 1. results in actual control; 2. involves key industries; 3. has factors imposing or possibly imposing material impact on the economic security of the state; and 4. results in transfer of actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands.86 The M&A Rule 2006 did not list "key economic sectors", define "national economic security", nor prescribe detailed procedures.87 There have been no reported cases in which transactions were prohibited expressly under Article 12, but some transactions have been delayed for unknown reasons until the parties abandoned the transaction. For instance, Carlyle was forced to withdraw the proposed acquisition of XCMG owing to the parties' inability to obtain MOFCOM's approval within three years after concluding the contract.88 This case was similar to the circumstances prior to FINSA 2007, where CFIUS's credibility had been compromised because of high-profile scandals, such as CNOOC—Unocal and Dubai Port. A separate security review system has been established with the enactment of the Anti-Monopoly Law 2008 ("AML 2008")-89 Article 31 provides for an additional review of concentrations by foreign investors: "when foreign M&As of domestic enterprises involve national security, they shall be subject to review according to relevant regulations, in addition to the anti-monopoly review provided for by the AML 2008".90 This provision seems to embody a universal concern that most governments have for protecting national security interests in the face of increasing economic globalisation.91 On 3 February 2011, the State Council issued the Notice on Establishment of a Security Review System for Acquisition of Domestic Enterprises by Foreign Investors (the "NSR Notice").92This long-awaited Notice formally formalised an NSR mechanism and set different thresholds to trigger NSR when necessary Serving as a legal basis, the NSR Notice implements Article 31 of AML 2008. It represents a clear signal that China intends to take a more systemic approach in monitoring foreign investment in sensitive sectors, and requires the parties concerned to co-operate with the panel when inquiries occur.93 On 4 March 2011, one day before the NSR Notice came into effect, MOFCOM issued the Interim Regulations for Implementation of the NSR system as established in the Notice (the "Interim Regulations"). On 25 August 2011, MOFCOM promulgated the Provisions of the Ministry of Commerce on the Implementation of Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (the "NSR Provisions"), which came into effect on 1 September 2011, superseding the Interim Regulation. It finalises the NSR procedures for inbound M&A transactions, even without any significant changes vis-a-vis the Interim Regulations. (b) Enforcement matters again! Although modelled after CFIUS's practice of separating antitrust reviews from NSRs,94 neither Article 12 of the M&A Rule nor Article 31 of AML 2008 provides adequate guidance on the nature of China's NSR for Chinese authorities charged with the task or foreign investors considering an acquisition.95 They have sparked concerns among foreign investors that future acquisitions will be subject to much tighter control by the Chinese enforcement agencies. It is also alleged that MOFCOM attempted to use the national security provisions contained in the M&A Rules and AML 2008 to protect Chinese domestic industries from foreign investment.96 The NSR regime represents the culmination of a vigorous debate regarding the perceived national security issues, with particular concerns focused on "strategic and sensitive" industries and Chinese "national champions". Some procedural issues arise as to when the acquiring party must file an application and what materials and information must be provided at the time of initial notification to MOFCOM. It is unlikely that the NSR Notice is intended to raise the bar for foreign investment into China. It remains to be seen how strictly the government will enforce the NSR regime. MOFCOM, NDRC and other relevant governmental agen-cies will look both at the substance and actual impact of the arrangements as to whether an M&A transaction falls within the scope of a security review. 2. Scope Both systems under the CFIUS and NSR aim to review the effect on national security arising from foreign acquirers' investment in their own domestic enterprises. There are significant differences despite the latter bearing a substantial resemblance to the former's procedures. China defines "national security" more broadly than does the definition used by CFIUS. CFIUS has explicitly rejected the inclusion of the concept of economic security in the definition of national security. As a practical matter, CFIUS will consider economic issues, but only if they affect national security. China's NSR Notice expressly indicates that national security will include such economic concerns as impact on domestic capacity, the domestic economy, basic social order, and domestic research and development (R&D) capabilities.97 There is inherent uncertainty as to when a transaction will be the subject of the NSR. A fundamental shortcoming of the NSR regime is the lack of clarification as to which industrial sectors are subject to the NSR .The scope appears to be overly broad as it includes industries without an apparent relevance to national security.98 The security review regime remains opaque and adds to the existing uncertainty for foreign investors in China, because neither the Notice nor the Provision provides a clear definition of the industries within which the NSR will be triggered. The interpretation will be subject to the discretion of the enforcement agencies, resulting in the consequential uncertainty about the exact scope of NSR. (a) Actual control: de facto and de jure In principle, a transaction will only fall within the scope of the security review regime if the foreign investor acquires de jure or de facto control of the target. Although there is some ambiguity due to Chinas structural contexts, the focus on "actual control" appears generally to be consistent with CFIUS practice." The NSR Notice defines "control" to include situations where: (i) foreign investors own more than 50% of the shares; (ii) a foreign investor owns less than 50% of the shares but has sufficient voting rights to exert a material influence over the shareholders vote and resolutions of the board of directors; and (iii) foreign investors otherwise gain actual control of management decisions, human resources, or technologies.100 It seems that an NSR will be triggered if the investors are individually or collectively able materially to influence key actions of the target enterprise.101 A specific threshold still remains unaddressed as to when security review notifications are required. There is no minimum threshold amount below which transactions are not subject to review if they otherwise fall within the NSR Notice scope. It is difficult to determine what would constitute "significant influence" over shareholders or board decisions which results in a foreign investor being deemed to have acquired actual control.102 One possible circumstance could be where a foreign investor buys a stake in a domestic company, thereby increasing total foreign ownership above 50%, but no individual foreign shareholder will have control. It remains unclear as to when an acquisition of the minority stake would trigger NSR, neither does the Notice specify when the investor must file an application. It is likely that such a scenario would not trigger a merger control notification because of the absence of a change in control. However, it could trigger a notification under the NSR Notice, because several foreign investors will then jointly own more than 50% of the shares. One problem is that under certain circumstances, a foreign investor might be unaware that its acquisition of shares will increase foreign ownership above 50% and thus require an NSR Notice. In this regard, the NSR may be widely applied to raise additional regulatory hurdles or even block many M&As of Chinese domestic companies. It also raises considerable concerns about the ability of foreign companies to pursue M&A growth strategies in China.103 (b) Impact The NSR Provision states that the issue of whether an inbound M&A falls within the NSR's scope shall be assessed on the basis of the substance and actual impact of the transaction. The scope of reviews goes well beyond national security by subjecting them to a test of the investment's impact on China's economic stability and social order. The panel will review and potentially reject acquisitions provided the transaction would affect: (i) national defence, productivity and supply capabilities; (ii) operational stability of the PRC economy; (iii) social order; and (iv) research and development (R&D) of the PRC's technologies key to national security.104 Although the regime leaves the term "critical infrastructure" vague, telecommunications, energy assets and transportation infrastructure would typically qualify.105 No details have been given, however, as to what considerations are to be taken into account in assessing these issues. In the absence of further guidance, it may be difficult for a notifying foreign investor to assess whether their envisaged transaction may have an effect on "basic social order" or "national economic stability". This will pose challenges for the acquiring party to submit information that would satisfy the NSR panel. The security review regime seems to have a broader scope in terms of sectors and types of transactions. There is little doubt that the implementation of the NSR regime will add regulatory burdens, such as time and cost, to foreign investors attempting to acquire Chinese domestic enterprises. More significantly, a reasonable NSR will contribute enormously to the reform of a healthier global investment environment, so as to eliminate unintended consequences to the detriment of recovery of the current financial crisis. The lack of detail could increase the level of uncertainty in the foreign investment approval process, and add further delay in obtaining regulatory clearance.106 The NSR regime formalises the concept of NSR that is embodied in the existing FDI approval regime. The clear separation of competition reasons from national security considerations would increase transparency and predictability. The interactive clarification between the new and the existing regimes is vital from a transaction management perspective. Nevertheless, the lack of a transitional explanation of the interrelationship between the complex governmental agencies jeopardises NSR efficacy. It is essential to examine the issue when a deal is to be subject to more than one review institutionally and hierarchically. (a) FDI approval v NSR regime The interaction between the general FDI approval procedures and the NSR process remains uncertain. The NSR system does not replace any of the existing controls on M&As and foreign investment in China. It is possible that the new NSR regime will run parallel with other laws and regulations, since it makes little sense for a deal to go through separate reviews on national security grounds. The first measures providing for separate FDI review on national security grounds appeared in the M&As Rules.107 However, on 16 February 2011, NDRC issued informal guidance indicating that foreign investors will not be required to make a separate filing to initiate a security review; rather, the parties may be asked to provide information necessary for the security review in the course of other regulatory reviews.108 It appears that the NSR panel will proceed on the basis of information provided in the course of existing foreign investment approval processes. It is unclear whether the NSR is in effect part of the existing FDI approval framework. Furthermore, Chinas FDI system has been progressively decentralised in recent years.109 The local enforcement agencies have received greater authority to approve larger projects without central government involvement. The new NSR system makes it feasible to channel certain transactions to the NSR panel for review. It remains unclear as to whether local approval authorities should suspend their reviews or withhold their decisions pending the outcome of the NSR process, even for transactions that are unlikely to trigger such concerns. It is not clarified whether the notification for NSR should be submitted by the foreign investor directly to MOFCOM or through its local branches. (b) NSR vis-a-vis AML 2008 As discussed earlier, AML 2008 specifies an NSR procedure for acquisitions of domestic companies by foreign investors. A foreign party could be subject to both an economic antitrust review and an additional NSR review. An NSR is required alongside merger control review if applicable where a foreign investor acquires actual control of a sensitive sector. Exceptionally, a review is required in any event if the sector involved is military or related sectors,110 in which there is no minimum threshold. These transactions will be be subject to review irrespective of whether they lead to a "concentration" as defined in the AML 2008.111 This approach seems to have been inspired by a decision in the US that effectively blocked proposed Chinese investments in mining companies that turned out to be proximate to military facilities."2 Notably, not all transactions subject to merger review under the AML 2008 will be subject to NSR1 an M&A is reviewable only if the foreign investor will gain "actual control" of the enterprise in a key sector. And conversely, not all transactions subject to NSR will simultaneously be subject to merger control review - for instance, when the parties do not meet the merger control thresholds and MOLCOM does not sua sponte initiate an antitrust review.113 Nevertheless, the overlapping situation inevitably complicates the NSR where national security concerns are involved in both antitrust review and the NSR. It is neither clear as to how MOFCOM will treat transactions that are notified under both the AML control and the NSR Notice, nor certain about how to handle the risk of inconsistent outcome. More specifically, the M&As Rules 2006 sought to protect the Chinese economy from any threats to its "national economic security", which includes "key industries" and "famous brands"."4 Chinas reluctance to let the well-known Chinese brand Huiyuan pass to foreign control seems to be a perfect example involving pure economic nationalism."5 Coca Cola—Huiyuan shows that Chinas broadly defined national security concept has crept into AML enforcement.1It seems that the Chinese government plays a double role: it is both the owner of the major players and the referee, which is detrimental to the development of Chinas market economy.117 This raises concerns that protection of such SOEs from competition may be an aspect of "national security" that is to be taken into account in the separate review."8 A subtle issue arises as to whether the aim of "national security" could be used to protect Chinese SOEs or national champions from competition where an acquisition does not threaten national security per se. It remains to been as to whether Article 12 of the M&As Rules 2006 has survived the enactment of Article 31 of the AML 2008; or whether the concept of protecting "famous brands" in Article 12 is now encompassed in the NSR Notice. The lack of guidance could result in potential contradiction and increase the level of uncertainty. MOFCOM updated the NSR Provision which, together with the State Council's NSR Notice, will have a broad impact on structuring inbound M&A transactions undertaken by foreign investors. The procedural and substantive facets of the new NSR regime formalise the process and add some parameters, resembling analogous procedures for screening foreign investment on national security grounds in other major jurisdictions."9 In particular, the structure reflects an analytical approach quite similar to that adopted by the CFIUS. In response to growing concerns of protectionism and nationalism, the NSR system marks the path forward by establishing a firm framework for review of foreign M&As on national security grounds. However, the NSR regime has been tailored to Chinas particular legal and policy environment, which inevitably renders the process opaque and discretionary. The rules will leave great discretion in the hands of the NSR panel. The screening may constitute a certain impediment to FDI, which could make transactions involving foreign acquirers more challenging. It remains uncertain whether the system will be applied arbitrarily to deter specific deals, or whether it will be implemented with openness and transparency. Whether they will constitute serious obstacles for foreign companies will depend largely upon how the rules are applied in practice. There is a general trend towards economic protectionism. Some restrictions on the ground of national security have provoked a wave of investment protectionism, which may undermine globalisation and harm the global economy. (It is worth noting that erecting trade barriers precipitated the Great Depression.120) The move, driven by the Chinas new NSR regime, has caused concerns among foreign businesses that national security could be used as a pretext for protectionism. Both home and recipient states have a key stake in promoting an open investment regime.121 An increasing challenge is to strike a proper balance between making the host countries attractive to SWFs and simultaneously maintaining a transparent market-based regime.122 Apart from hard law, it also makes great sense to examine how transnational soft initiatives may play a complementary role. Against the lure of protectionism All recipient countries have rules in place regulating the entry of foreign capital and investment. Foreign investors are usually constrained to invest in strategic or sensitive sectors. Increasingly protectionist policies have been put forward even in free market economies following the financial crisis across jurisdictions.123 Economic nationalism, the desire to protect a nation's champion firms or defend against monopoly by another nations enterprises has prevailed over capitalist principles of profitability or efficiency.124As Musgrove and lougas observed: "Chinas new national security review provision may in reality be the result of political compromise between reformists in China, who support the adoption of competition policy consistent with other major jurisdictions and international best practices, and protectionists, who prefer to protect domestic Chinese businesses from potential new foreign entry." Such leverage would easily lose its balance with possible future CNOOC-like cases. The biggest problem may not be outright protectionism, but the failure of host countries to take account of how their domestic policies affect their investment partners. MOFCOMs final decision against Carlyles acquisition of XCMC127 was announced only a few months after the CNOOC-Unocal debacle in the US. The M&As Rule 2006 can arguably be seen as a response to the perceived protectionism in CNOOCs unsuccessful acquisition of Unocal in 2005. To some extent, the NSR regime represents a hostile confrontation to similar bodies abroad that have hindered efforts of Chinese corporations to engage in offshore acquisitions. 129 This could potentially be seen as a tit-for-tat reaction against foreign governments scrutinising Chinese investments on the grounds of preservation of national security. China has responded with investment restrictions of its own, which inevitably lower the trajectory of economic growth in the West.130 The recipient countries should not erect protectionist barriers to foreign SWF portfolios. They should make sure that any restrictions imposed on investments for national security reasons are proportionate to genuine national security risks. It is vital for the parties to resist the siren calls of protectionism but also to avoid taking subtler forms, such as in the name of certain legitimate interests.131 It remains to be seen whether China's NSR process will result in economic protectionism. Whether these rules will constitute another serious obstacle for foreign companies doing business in China will depend upon how the NSR regime is applied, and how Chinese outbound investment will be treated reciprocally. It is worth examining how the international communities have endeavoured to ensure a free flow of capital through transparent and stable rules, while protecting the legitimate interest of national security. Under Chinas current legal and political environment, it remains uncertain as to how long it would take for Chinese SWFs to foster best practice in corporate governance, so as to achieve the highest levels of transparency and accountability.132 Hard law represents a bottom line under which certain violations would be penalised, while those internationally recognised soft initiatives will fill the gap to facilitate SWF compliance and play a complementary role in stabilising the global capital market. It is significant to examine how the host and home states are obliged to maintain the financial market's integrity through interacting both hard and soft laws. (a) International Monetary Fund (IMF): GAPP The IMF formally established an International Working Group of SWFs (IWG) to reach a consensus on a set of principles that properly reflect SWF investment practices and objectives.133 The Generally Accepted Principles and Practices (GAPP), also known as the Santiago Principles, provide a voluntary framework for appropriate governance and accountability by SWFs. In order to devise a code of best practices for SWFs, the IWGs work was guided by four main objectives: (i) to help maintain a stable global financial system and free How of capital and investment; (ii) to comply with all applicable regulatory and disclosure requirements in the countries where SWFs invest; (iii) to invest on the basis of economic and financial risk and return-related considerations; and (iv) to have in place a transparent governance structure that provides for adequate risk management and accountability.134 The legal framework for SWFs should be sound and support its effective operation and the achievement of its stated objective(s)J3S Owing to the GAPPs non-binding legal nature, the implementation of the 24 principles is on a volun-tary basis and subject to home countries\* laws and regulations. SWFs should maximise risk-adjusted financial returns based on economic and financial grounds. As for the IWG, "The pursuit of investment decisions free of political influence and publication of the GAPP should help improve understanding of SWFs as economically and financially oriented entities in both the home and recipient countries."136 Such an initiative should be seen as an important step in consolidating dialogue and understanding between SWFs and recipient countries. The best practices are supposed to encourage strictly market-based, rather than politically motivated investment by SWFs.137 Such an approach reflects the IMF's attempt to depoliticisc what is inherently a political and governmental entity. (b) Organization for Economic Cooperation and Development (OECD) Guidelines The OECD has repeatedly issued statements confirming its adherence to an open-door investment policy, which endeavours to attract SWF investment without jeopardising the national security of OECD members.138 A set of Guidelines was agreed upon in 2009 to contribute to trust-building between SWFs and host countries.139 Underscoring more transparency, the Guidelines require that the objectives and operation of SWFs should be made more transparent to enhance the predictability of outcomes. They also call for host countries to implement more proportionate regulations, in particular, when existing measures are adequate to address national security concerns. The host state must ensure that it is not demanding adherence to a review process that is overly transparent or highly politicised.140 The OHGD approaches attempt to strike a balance between attracting foreign investments and ensuring national security interests, so as to foster best practices through emphasising openness and predictability in the treatment of foreign investors. As a non-OECD member, China's compliance with the Guidelines will have far-reaching implications. Despite being the second largest economy in the world, China has long been struggling to have its market economy recognised. It is believed that the World Trade Organisation (WTO) will automatically grant China this status in 2016.141 The adherence to the OECD Guidelines in operating SWFs and reviewing FDI will facilitate Chinas run for OECD membership, which would undoubtedly be an essential stepping-stone to success. With the best practice initiated by the OECD, China may reduce the gap by following international well-established standards in the playing field. Intangibly, this would also make a solid foundation for China to be a more responsible stakeholder in the global financial market apart from its economic success. 3. Hard law vis-a-vis transnational soft initiatives The global economic security relationship with China depends upon free-market policies. China and recipient countries have a mutual interest in maintaining an open international investment climate. Global competition law has been marked by a high degree of convergence in both sub-stantive law and procedure.1 - China is gradually taking its place as a major regulator who will exercise concurrent NSR jurisdiction along with the US and EU over high-profile cross-border M&As. It is essential to secure approval from the three jurisdictions in order to complete significant deals in the future. The NSR regimes remain uncertain and may thus allow factors without any relation to national security to be included in the consideration by slipping behind the vague concept of national security.

#### Global protectionism causes full-scale wars – escalates to WMD use.

Panzer ‘7

Michael J. Panzer, a New York Institute of Finance faculty member and a graduate of Columbia University. Financial Armageddon: Protect Your Future from Economic Collapse, p. 137-138

The rise in isolationism and protectionism will bring about ever more heated arguments and dangerous confrontations over shared sources of oil, gas, and other key commodities as well as factors of production that must, out of necessity, be acquired from less-than-friendly nations. Whether involving raw materials used in strategic industries or basic necessities such as food, water, and energy, efforts to secure adequate supplies will take increasing precedence in a world where demand seems constantly out of kilter with supply. Disputes over the misuse, overuse, and pollution of the environment and natural resources will become more commonplace. Around the world, such tensions will give rise to full-scale military encounters, often with minimal provocation. In some instances, economic conditions will serve as a convenient pretext for conflicts that stem from cultural and religious differences. Alternatively, nations may look to divert attention away from domestic problems by channeling frustration and populist sentiment toward other countries and cultures. Enabled by cheap technology and the waning threat of American retribution, terrorist groups will likely boost the frequency and scale of their horrifying attacks, bringing the threat of random violence to a whole new level. Turbulent conditions will encourage aggressive saber rattling and interdictions by rogue nations running amok. Age-old clashes will also take on a new, more heated sense of urgency. China will likely assume an increasingly belligerent posture toward Taiwan, while Iran may embark on overt colonization of its neighbors in the Mideast. Israel, for its part, may look to draw a dwindling list of allies from around the world into a growing number of conflicts. Some observers, like John Mearsheimer, a political scientists at the University of Chicago, have even speculated that an “intense confrontation” between the United States and China is “inevitable” at some point. More than a few disputes will turn out to be almost wholly ideological. Growing cultural and religious differences will be transformed from wars of words to battles soaked in blood. Long-simmering resentments could also degenerate quickly, spurring the basest of human instincts and triggering genocidal acts. Terrorists employing biological or nuclear weapons will vie with conventional forces using jets, cruise missiles, and bunker-busting bombs to cause widespread destruction. Many will interpret stepped-up conflicts between Muslims and Western societies as the beginnings of a new world war.

(optional)

#### Independently, global economic decline causes war that escalate to WMD use.

James ‘14

Professor Harold James holds a joint appointment at Princeton in International Affairs (in the Woodrow Wilson School) and as Professor of History - specializing in European economic history. “Debate: Is 2014, like 1914, a prelude to world war?,” - Globe and Mail - Published Wednesday, Jun. 25, 2014 9:23AM EDT Last updated Wednesday, Jul. 02, 2014 - http://www.theglobeandmail.com/globe-debate/read-and-vote-is-2014-like-1914-a-prelude-to-world-war/article19325504/

As we get closer to the centenary of Gavrilo Princip’s act of terrorism in Sarajevo, there is an ever more vivid fear: it could happen again. The approach of the hundredth anniversary of 1914 has put a spotlight on the fragility of the world’s political and economic security systems. At the beginning of 2013, Luxembourg’s Prime Minister Jean-Claude Juncker was widely ridiculed for evoking the shades of 1913. By now he is looking like a prophet. By 2014, as the security situation in the South China Sea deteriorated, Japanese Prime Minister Shinzo Abe cast China as the equivalent to Kaiser Wilhelm’s Germany; and the fighting in Ukraine and in Iraq is a sharp reminder of the dangers of escalation. Lessons of 1914 are about more than simply the dangers of national and sectarian animosities. The main story of today as then is the precariousness of financial globalization, and the consequences that political leaders draw from it. In the influential view of Norman Angell in his 1910 book The Great Illusion, the interdependency of the increasingly complex global economy made war impossible. But a quite opposite conclusion was possible and equally plausible – and proved to be the case. Given the extent of fragility, a clever twist to the control levers might make war easily winnable by the economic hegemon. In the wake of an epochal financial crisis that almost brought a complete global collapse, in 1907, several countries started to think of finance as primarily an instrument of raw power, one that could and should be turned to national advantage. The 1907 panic emanated from the United States but affected the rest of the world and demonstrated the fragility of the whole international financial order. The aftermath of the 1907 crash drove the then hegemonic power – Great Britain - to reflect on how it could use its financial power. Between 1905 and 1908, the British Admiralty evolved the broad outlines of a plan for financial and economic warfare that would wreck the financial system of its major European rival, Germany, and destroy its fighting capacity. Britain used its extensive networks to gather information about opponents. London banks financed most of the world’s trade. Lloyds provided insurance for the shipping not just of Britain, but of the world. Financial networks provided the information that allowed the British government to find the sensitive strategic vulnerabilities of the opposing alliance. What pre-1914 Britain did anticipated the private-public partnership that today links technology giants such as Google, Apple or Verizon to U.S. intelligence gathering. Since last year, the Edward Snowden leaks about the NSA have shed a light on the way that global networks are used as a source of intelligence and power. For Britain’s rivals, the financial panic of 1907 showed the necessity of mobilizing financial powers themselves. The United States realized that it needed a central bank analogous to the Bank of England. American financiers thought that New York needed to develop its own commercial trading system that could handle bills of exchange in the same way as the London market. Some of the dynamics of the pre-1914 financial world are now re-emerging. Then an economically declining power, Britain, wanted to use finance as a weapon against its larger and faster growing competitors, Germany and the United States. Now America is in turn obsessed by being overtaken by China – according to some calculations, set to become the world’s largest economy in 2014. In the aftermath of the 2008 financial crisis, financial institutions appear both as dangerous weapons of mass destruction, but also as potential instruments for the application of national power. In managing the 2008 crisis, the dependence of foreign banks on U.S. dollar funding constituted a major weakness, and required the provision of large swap lines by the Federal Reserve. The United States provided that support to some countries, but not others, on the basis of an explicitly political logic, as Eswar Prasad demonstrates in his new book on the “Dollar Trap.” Geo-politics is intruding into banking practice elsewhere. Before the Ukraine crisis, Russian banks were trying to acquire assets in Central and Eastern Europe. European and U.S. banks are playing a much reduced role in Asian trade finance. Chinese banks are being pushed to expand their role in global commerce. After the financial crisis, China started to build up the renminbi as a major international currency. Russia and China have just proposed to create a new credit rating agency to avoid what they regard as the political bias of the existing (American-based) agencies. The next stage in this logic is to think about how financial power can be directed to national advantage in the case of a diplomatic tussle. Sanctions are a routine (and not terribly successful) part of the pressure applied to rogue states such as Iran and North Korea. But financial pressure can be much more powerfully applied to countries that are deeply embedded in the world economy. The test is in the Western imposition of sanctions after the Russian annexation of Crimea. President Vladimir Putin’s calculation in response is that the European Union and the United States cannot possibly be serious about the financial war. It would turn into a boomerang: Russia would be less affected than the more developed and complex financial markets of Europe and America. The threat of systemic disruption generates a new sort of uncertainty, one that mirrors the decisive feature of the crisis of the summer of 1914. At that time, no one could really know whether clashes would escalate or not. That feature contrasts remarkably with almost the entirety of the Cold War, especially since the 1960s, when the strategic doctrine of Mutually Assured Destruction left no doubt that any superpower conflict would inevitably escalate. The idea of network disruption relies on the ability to achieve advantage by surprise, and to win at no or low cost. But it is inevitably a gamble, and raises prospect that others might, but also might not be able to, mount the same sort of operation. Just as in 1914, there is an enhanced temptation to roll the dice, even though the game may be fatal.

### 1AC — Plan

#### The United States federal government should substantially increase its economic and/or diplomatic engagement by requiring that CFIUS reviews of investment projects from the People’s Republic of China be more transparent and fulfill a standard of most favored nation, non-discriminatory treatment.

### 1AC — Solvency

#### Contention Three — Solvency:

#### It’s now or never for the BIT. US can’t keep pushing China for QPQ’s. A US concession on security reviews is key to solving.

Hu – June 7th - ‘16

Hu Weijia is an analyst and reporter with the Global Times that writes for the newspaper’s Opinion Pages on matters concerning international and economic affairs. – “US must meet China halfway to reach agreement in investment treaty negotiations” - Global Times, June 7th - http://www.globaltimes.cn/content/987281.shtml

After years of negotiations, the talks are now at a critical moment as the two nations are expected to submit their new "negative list" proposals for those sectors that will remain off-limits to investment from the other side. The US wants China to shorten its list of these sectors, while China wants the US to make concessions in areas such as high-tech investment and security reviews. Although top leaders on both sides have called for the rapid conclusion of a high-standard China-US BIT, this will not be a simple task, either for China or for the US. China's National Development and Reform Commission, the country's top economic planning agency, published a draft earlier this year on adopting the negative list approach in some pilot areas in the country. It was considered unlikely that China would adopt the negative list approach several years ago, because it was totally different from the country's existing management system for foreign investment. In the process of extending the negative list approach, the central government has to push forward domestic reforms and promote the formation of a national consensus among various interest groups. However, it is doubtful whether the Obama administration has enough political resources to push forward domestic reforms, especially at a time when American society is showing less enthusiasm for the BIT negotiations. It seems the US now wants to pressure China to make more concessions in order to reach an agreement. But it is unrealistic for the US to force China to sign the agreement without making concessions itself. While China will make great efforts to adopt the negative list approach, the US has to properly handle issues such as security reviews to meet the concerns of the Chinese side. According to media reports, Chinese telecommunications giant Huawei recently became the target of a US investigation over its trade with Iran. Concerns were expressed by some in China that this represented unfair treatment of Chinese investment by the US. The Obama administration may need to put more focus on domestic affairs, instead of putting pressure on China. Admittedly, there's not much time left for the two countries. If negotiations are not concluded while Obama is still in office, the treaty might be hit by growing uncertainties.

#### A US Concession avoids an *action-reaction cycle* where both sides block investments. Strict Security Reviews *hurt negotiations* OR *mean the treaty gets too watered-down*.

Martina ‘15

Michael Martina - Beijing-based reporter for Reuters, covering politics and trade. Internally quoting Tim Stratford, a former assistant U.S. Trade Representative and the current chair of the BIT task force of the American Chamber of Commerce in China - “U.S. urged to amend national security proviso in China investment treaty talks” – Reuters - Oct 23, 2015 - http://www.reuters.com/article/china-usa-investment-idUSL3N12N33I20151023

The United States must amend a standard national security provision in investment treaties when negotiating with China, a U.S. business lobby said on Friday, or risk giving Beijing the green light to limit U.S. market access. China, which has more barriers on foreign investment than the United States, is in talks with Washington to narrow the "negative list" of sectors closed to the other side's investors as part of a bilateral investment treaty (BIT). Keeping a standard exemption in the treaty for sensitive sectors could allow China to apply the proviso to its own national security, which it defines more broadly, to cover anything from the military to ecological, societal and cultural security. Washington should make adjustments to the model treaty it has used since 2012 in order to tackle "Chinese circumstances", Tim Stratford, the chairman of the BIT task force of the American Chamber of Commerce in China, told reporters. "While it's a very strong starting point for negotiations, it might be appropriate to make a few adjustments in it that would make it more directly applicable," Stratford told reporters at a briefing on a Chamber report on the talks. "If you have the same carve-out on the Chinese side but they have a definition that is this broad, then you can see why that could raise some concerns," added Stratford, a former assistant U.S. Trade Representative. U.S. investors hope that a treaty will widen their access to many industries tightly controlled in China, from financial services to healthcare. Beijing and Washington have agreed to hasten work on the investment treaty, but business groups fear new national security guidelines in China could stall progress. Foreign companies say the rules are a rollback of China's vows to usher in market reforms, as they require use of "secure and controllable" technology, with data operations to be based on the mainland. China says the new policies will bolster networks and better regulate information in the face of growing security threats. The "protracted rollout of market openings" will not only hurt the Chinese economy, but could have a "cooling effect" on talks, the Chamber said, adding that Chinese officials had told numerous companies that further market opening would be delayed until the investment treaty was complete. "What is needed is true market access without underhanded and unwritten barriers that could potentially render the BIT meaningless," Chamber Chairman James Zimmerman said in the report.

#### Security review reforms actualize a Bilateral Investment Treaty – most Chinese complaints center on the *transparency of the CFIUS process*.

Moran ‘15

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The United States and China have continually sparred in the area of national security reviews for bilateral investment. The current negotiations on an investment treaty between the two countries cover a wide range of topics. The US-China bilateral investment treaty (BIT) could be an opportunity to clear up issues relating to security reviews, although both sides may end up disappointed. China's grievances stem from some high profile acquisition attempts launched by Chinese firms that were ultimately unsuccessful because they ran into political obstacles from the US Congress or the CFIUS. But the high-profile cases have skewed public perception and now some see (consider) CFIUS as an unfair barrier to Chinese investments in the United States. The Chinese will look to accomplish two things in the BIT. First they would like to ensure greater transparency in order for Chinese firms, including state-owned enterprises (SOEs), to have a clearer understanding of the decisions criteria in a CFIUS review. Second, they would like CFIUS to apply the same criteria to a Chinese firm trying to acquire a US firm as it would to a British firm doing the same. This is called most favored nation (MFN) treatment. Chinese commentators point to the perception that even the prospect of going through a review is sometimes enough to prevent an investment. Moreover, additional factors, besides the prospect of a CFIUS review, may discourage potential foreign investors. In certain industries foreign investment is explicitly limited or prohibited by the US Congress, namely natural resources, telecom, TV, and radio. Investment in other sectors may face barriers even though the official US policy is an open door. As mentioned, congressional disapproval can prove too much for a foreign investor. Intense media scrutiny, usually linked to congressional protests, can force a bid withdrawal if it sparks strong negative public sentiment. Most of the Chinese grievances could be alleviated if the BIT could simplify the CFIUS process. The US government is unlikely to take further steps to ease the path through CFIUS, but recently more and more investors, including from China, have successfully navigated a CFIUS review. Several foreign investors have experienced an almost xenophobic attitude toward their proposed investments in the United States. Firms based in Japan, the Middle East, China, and even France have all faced issues springing from fear held by the American public that the foreign investor would acquire a vital US company. CFIUS vets legitimate national security concerns, but public misgivings often extend well beyond the national security realm. Despite these occasional eruptions, the United States remains a popular destination for inward foreign investment. In 2013, the United States received a net inflow of $160 billion from inward foreign investment. In that year, worldwide flows topped $1.4 trillion. The United States wants to maintain its position as a leading destination for foreign investment. Studies show that foreign firms employ over 5 million workers in the United States, and they pay higher wages than most domestic fi rms. Studies also show that foreign firms in the United States perform at a very high level, fostering a competitive environment, which boosts the performance of domestic fi rms. Inward FDI also increases domestic spending on research and development (R&D). Inward FDI is concentrated in select but important sectors, such as advanced manufacturing, energy, technology, and finance. The presence of leading edge foreign firms facilitates the diffusion of high technology and innovative management to domestic firms, creating a stronger US economy. This shows up in the positive correlation between inward FDI and domestic productivity. China had inward FDI flows of around $250 billion in 2013, but outward FDI has lagged far behind. 3 China’s outward FDI stock totals around $500 billion, while its inward FDI stock totals more than $2 trillion. China’s outward FDI stock placed in the United States is approximately $47.5 billion in 2014, less than one-tenth China’s total outward stock, and more than half of that arrived in the last two years. 4 Chinese investment in the United States is gathering speed, amounting to $14 billion in calendar year 2013 and $12 billion in calendar year 2014. Chinese companies invest in the United States to take advantage of highly skilled workers, to acquire new production technology, and to reach the US consumer market. It wouldn’t make sense for Chinese companies, with cheaper labor at home, to seek low-skilled US workers. Chinese firms spend on considerable R&D in the United States to adapt their products to the American market. Somewhat surprisingly, Chinese-owned firms in the United States tend to export a larger fraction of output than their US counterparts. US sentiment toward growing Chinese investment is becoming more positive, especially at the state level, where governors vie to attract job-creating firms to their economies. However, convincing Americans that Chinese investment does not pose an economic or security threat can be difficult. As a side advantage, the CFIUS process provides reassurance to the public at least with respect to security concerns. THE CFIUS PROCESS CFIUS was created in the 1970s, as fear spread that Middle Eastern governments, flush with profits from high petroleum prices, would begin to acquire vast tracts of US real estate. This fear was overblown, and massive purchases of US assets did not materialize. Nonetheless CFIUS was created in 1975 to ensure that inward investments would not jeopardize national security. Yet presidential authority to block transactions was not legalized until after 1987, when a Japanese firm attempted to acquire a French-owned technology firm based in the United States. In 1988, the Exon-Florio Amendment was passed giving the president authority to block transactions that might harm US national security. The president subsequently delegated investigatory authority to CFIUS. Only two transactions have been explicitly prohibited by a US president, in 1990 and 2012, and in both cases the acquiring firms were Chinese. A fresh congressional storm erupted in 2006 over the proposed acquisition of a British firm, Peninsular and Oriental Steam Navigation Company (P&O), which owned ports all over the globe, including in the United States. The acquiring firm was based in the United Arab Emirates (and controlled by the Emir of Dubai) called Dubai Ports World. After CFIUS cleared the transaction, a congressional uproar manifested in the form of a 62-2 vote against the transaction within the House Appropriations Committee. Dubai Ports World went through with the transaction but was forced by political pressure to divest the six US ports, selling them to an American entity. This episode led to further changes in the CFIUS process, implemented in 2007 by the Foreign Investment and National Security Act (FINSA). The scope of the national security review was expanded and CFIUS now looks, among other issues, at the possibility of “three threats” ( described in more detail later): 1 . denial or manipulation of access to supplies, 2. leakage (referring to sales of goods or technology, especially of a military nature), and 3. sabotage or espionage. Apart from SOEs, foreign investors in the United States are not required to initiate a CFIUS review, but lawyers recommend that they do so. While CFIUS has not distinguished between “mixed ownership” firms— partly state-owned and partly privately owned—and fully state-owned firms, any mixed ownership firms would be well advised to initiate a CFIUS review. If a foreign firm does not fi le a notice to CFIUS regarding a proposed transaction, then CFIUS can initiate its own investigation, and subsequently order a divestment. The process involves a 30-day review, and the majority of transactions are cleared in this time period. But the committee may initiate an additional 45-day investigation if it needs more time. This second 45-day investigation is mandatory if the foreign acquiring firm has ties to a foreign government or involves critical infrastructure in the United States. The president has 15 days to evaluate CFIUS findings and allow or prohibit the transaction. The committee’s deliberations are secret, and (with few exceptions) it reports summary statistics only on the cases reviewed and investigated. A closer look at how CFIUS operates and initiates its investigations reveals that notices to CFIUS have in- creased substantially and so have the percentage of cleared investments. Since 2008, any entity controlled by a foreign government must notify CFIUS of an intended acquisition. This is not the case for private companies, although it is generally a good idea for them to do so. Clearance by a CFIUS review can help shield the foreign firm from congressional or public criticism. From 2008 through 2012, foreign firms fi led 538 notices of transactions with CFIUS. Of these, 6 percent of the firms (32 cases) withdrew from the review process before it was finished, 31 percent (168 cases) went through an investigation, and 7 percent (38 cases) withdrew during the investigation. CFIUS recommended divestiture in just 1 case in those five years, where a presidential decision was made to force Ralls Corporation to sells its American assets. The other 44 percent (238 cases) were cleared during the review process without the need for an investigation. This means CFIUS deemed nearly 87 percent (468 out of 538) of the notices as not a threat to US national security, a very high rate. However, some firms were subject to mitigating measures (8 percent of cases from 2010 through 2012). Mitigating measures ranged from allowing only US citizens to handle certain products and services to termination or sale of specific US business activities. There are many reasons why firms may withdraw before or during the investigation process. Sometimes the fi ling parties may not be able to answer all the national security or other related queries within the review or investigation process and decide to withdraw and refi le at a later time. Also if the terms of the transaction change, the party may withdraw and refi le later, or if the transaction is abandoned for commercial reasons then the party will withdraw the notice. For example, in 2012, 22 cases were withdrawn during the review or investigation process, and 12 of those cases were refi led in 2012 or 2013, with the rest abandoning the transaction either for commercial reasons or because of national security concerns raised by CFIUS. Several high-profile cases have shaped public opinion, in the United States and abroad, on the process foreign investors must endure when investing in the United States. In 1992, a French firm, Thompson (58 percent owned by the French government), tried to acquire an American firm, LTV Corporation, which possessed sensitive missile technology. Thompson had sold weapons to Iraq and Libya, and there was no way to ensure that future sales would not be initiated in zones of US military activity. Thompson subsequently withdrew its bid. In 2002, CNOOC proposed to buy the American-owned Unocal, which had some drilling activity in the Gulf of Mexico. Protestors worried that CNOOC would divert oil sales from the United States to China. While this fear was overblown, CNOOC eventually withdrew its bid. Commentators say that the knowledge gained from this failure helped CNOOC close a deal in 2013 to buy Canada’s Nexen, also with significant operations in the Gulf of Mexico. CFIUS did mandate that CNOOC give up operating control of its Gulf activities, although CNOOC still can collect the revenue. In 2010 a Chinese SOE, Anshan Iron & Steel Group, came under political fi re for its attempted investment in US-owned Steel Development Company. Anshan withdrew its bid amid congressional pressure. Opposition to foreign acquisitions on supposed national security grounds sometimes originates from the desire of US-based competitors to acquire the target company more cheaply on their own. Chevron, for example, led the attack against CNOOC’s proposed acquisition of Unocal, and when the Chinese deal fell through Chevron acquired Unocal itself. Since the FINSA reform of CFIUS legislation in 2007, US domestic political pressure has been less effective in stopping transactions. During Shuanghui International’s purchase of Smithfields in 2013, the largest pork producer in the United States, there was significant congressional opposition to a Chinese firm taking over an important part of US food supply, but congressional pressure was not strong enough to force Shuang- hui to withdraw its bid. The bid subsequently passed a CFIUS investigation and the acquisition was completed in July 2013. This may have been partly due to greater Chinese experience at acquiring US firms, and there- fore increasing confidence by the Chinese investors that they could withstand public criticism and just focus on national security concerns. Shuanghui started educating public opinion early and hired skillful lawyers and consultants to guide the Chinese parent through the process. Moreover, there was no legitimate security concern in this case, just the fact that an important American company would be sold to a Chinese company. Shuanghui’s skill in navigating both the CFIUS process and potential congressional opposition provides a teaching lesson to other Chinese firms that seek to acquire “brand name” US fi rms. Chinese firms have recently been less reticent about investing in the United States. From 2007 to 2009, Chinese firms filed 13 notices with CFIUS, but from 2010 through 2012, they fi led 39 notices, accounting for 12 percent of all notices. This includes 23 notices fi led in 2012 alone, twice the level in the previous year, the most for any country in 2012 (figure 1). In comparison, UK investors fi led 21 percent of total notices during the 2010–12 period, the highest from any country over the three- year period. China fi led more notices than French (9 percent) and Canadian (10 percent) firms during that time. Of China’s 39 notices fi led, 20 were in the manufacturing sector, 12 in mining, utilities, and construction, while the other 7 were in finance, information, and services. China’s commerce minister remarked that the CFIUS process needs to be “more open and transparent, because companies never know whether their bid meets the requirements... . We need clearer guidelines on what conditions might violate U.S. Security, to reduce risk for companies that want to invest.” Seeking clearer guidelines, one of us (Moran 2009) has spelled out circumstances in which both CFIUS and foreign investors can determine whether a genuine security threat exists. These are not official CFIUS guidelines but constitute a common sense approach to evaluating foreign investment. The first “threat” identifies critical supply, when a foreign firm acquires a company in a concentrated industry, thereby limiting the purchasing options for firms in the US economy. The threat of denial or manipulation of supplies is credible only if the asset to be acquired is critical to the functioning of the US economy and alternative sources of sup- ply are not readily available. The next “threat” is that of technology leakage, where the firm being acquired has a narrowly available technology, ability, or management expertise, and the sale of that firm may significantly enhance a foreign country’s capability, thereby reducing US national security. The threat of leakage of technology via foreign acquisition is worrisome only if such technology is not widely available from other sources. It should be noted that this approach identifies not only whether the proposed acquisition takes place in a sector deemed to be “critical” but also whether market concentration in that sector is sufficiently concentrated that supplies could be manipulated by the acquirer or technology obtained by the acquirer would make a strategic difference. The third “threat” involves infiltration, surveillance, or sabotage and identifies acquisitions like telecom or ports that may give foreign governments a platform to spy on or sabotage the US economy. A rigorous investigation of whether these three threats are plausible means that the circumstances in which a CFIUS disapproval of the foreign acquisition is justified will be relatively rare. Even if one of these situations occurs, mitigating measures can be imposed on the acquiring firm, such as allowing only US citizens to run certain departments or insisting the firm give up control of or divest certain operations. Missing from CFIUS’s evaluation—a feature that characterizes investment review in many other countries—is that it does not take into account economic interests when deciding whether to recommend disapproval to the president. The United States would like the BIT to make sure that China’s investment review does not take economic interests into account for US investments into China. One of the core tenets of the US government is to facilitate an environment of free enterprise, where markets determine prices and firms compete freely against one another. A US-China BIT is not likely to make the process any easier, but any government is going to reserve that right to block potentially threatening investments. Chinese firms should feel confident that, if they do not pose a national security threat, their transactions will not be blocked by CFIUS. To be sure, Chinese firms face other potential pitfalls. As with Japanese investors in the 1980s and 1990s, some members of the American public are wary of Chinese takeovers. Therefore Chinese investors must have a strategy to deal with public opinion. Getting an early feel for how the transaction will be perceived is critical, and Chinese firms should not expect that they can fly under the radar of US media attention. Early opinion surveys may save time and money down the line. As Chinese firms make further US acquisitions, the experience gained should help pave the way for future transactions. A US-China BIT is unlikely to change the CFIUS process because of the difficult political climate, but it could foster greater disclosure of unclassified evidence, arguments, and allegations considered in CFIUS deliberations. This possibility was foreshadowed by the decision of the Court of Appeals for the Federal Circuit that parties to transactions under CFIUS review should be offered the opportunity to review, respond to, and rebut any unclassified evidence or reasoning upon which a presidential order depriving them of property is based. For increased transparency, Chinese firms that hire an experienced lawyer could come to find out any objections by the committee. A BIT could partly satisfy China by requiring CFIUS to provide a written mitigation proposal to the acquiring Chinese firm within a certain number of days after they supply all the information requested by CFIUS. As for granting MFN status, neither Congress nor CFIUS actually treats all foreign countries the same due to geostrategic considerations, so national security reviews will be unlikely to operate under the same norms as commercial policies, and a BIT will not change this. Chinese investment in the United States has risen quickly in the last few years, and will continue to grow, and investors will gain more experience on how to navigate the CFIUS process. The US government is unlikely to change how CFIUS reviews foreign investment. There may be some room for increased transparency, such as releasing unclassified documents in cases of denial of investment. But the United States may compensate in other areas, for example, adding affirmative language in the BIT that Chinese firms will be permitted to invest in federally funded infrastructure projects, including those administered by the states. Also, a “ratchet” provision could be added to prevent US states from passing further legislation restricting Chinese investment, thus reassuring China that US states can’t try to block Chinese investments by implementing new laws. So China may not get the changes they want to CFIUS, but they might be satisfied by other actions taken by the United States.

## 1NC

### 1NC — Knowing China Critique

#### [THE FIRST/NEXT OFF-CASE POSITION IS THE KNOWING CHINA CRITIQUE]

#### First, the aff attempts to “know” China via a detached and orderly analysis. This reduces a complex and nuanced society to a specimen that can be clinically observed and analyzed from afar. This conception of China as *knowable* actively constructs a self-other dichotomy that renders critical reflection impossible and creates a self-fulfilling prophecy of conflict.

Pan 4 — Chengxin Pan, Department of Political Science and International Relations at the Australian National University, 2004 (“The "China Threat" in American Self-Imagination: The Discursive Construction of Other as Power Politics,” *Alternatives: Global, Local, Political*, Volume 29, Issue 3, June/July, Available Online to Subscribing Institutions via Academic Search Premier, p. 305-306)

While U.S. China scholars argue fiercely over "what China precisely is," their debates have been underpinned by some common ground, especially in terms of a positivist epistemology. Firstly, they believe that China is ultimately a knowable object, whose reality can be, and ought to be, empirically revealed by scientific means. For example, after expressing his dissatisfaction with often conflicting Western perceptions of China, David M. Lampton, former president of the National Committee on U.S.-China Relations, suggests that "it is time to step back and look at where China is today, where it might be going, and what consequences that direction will hold for the rest of the world."2 Like many other China scholars, Lampton views his object of study as essentially "something we can stand back from and observe with clinical detachment."3

Secondly, associated with the first assumption, it is commonly believed that China scholars merely serve as "disinterested observers" [end page 305] and that their studies of China are neutral, passive descriptions of reality. And thirdly, in pondering whether China poses a threat or offers an opportunity to the United States, they rarely raise the question of "what the United States is." That is, the meaning of the United States is believed to be certain and beyond doubt.

I do not dismiss altogether the conventional ways of debating China. It is not the purpose of this article to venture my own "observation" of "where China is today," nor to join the "containment" versus "engagement" debate per se. Rather, I want to contribute to a novel dimension of the China debate by questioning the seemingly unproblematic assumptions shared by most China scholars in the mainstream IR community in the United States. To perform this task, I will focus attention on a particularly significant component of the China debate; namely, the "China threat" literature.

More specifically, I want to argue that U.S. conceptions of China as a threatening other are always intrinsically linked to how U.S. policymakers/mainstream China specialists see themselves (as representatives of the indispensable, security-conscious nation, for example). As such, they are not value-free, objective descriptions of an independent, preexisting Chinese reality out there, but are better understood as a kind of normative, meaning-giving practice that often legitimates power politics in U.S.-China relations and helps transform the "China threat" into social reality. In other words, it is self-fulfilling in practice, and is always part of the "China threat" problem it purports merely to describe. In doing so, I seek to bring to the fore two interconnected themes of self/other constructions and of theory as practice inherent in the "China threat" literature—themes that have been overridden and rendered largely invisible by those common positivist assumptions.

#### Second, their discourse creates a self-fulfilling prophecy. War is unlikely unless we embrace these representations.

Pan 12 — Chengxin Pan, Senior Lecturer in International Relations at Deakin University, former visiting professor at the University of Melbourne, the Hong Kong University of Science and Technology, and Peking University, holds a Ph.D. in Political Science and International Relations from the Australian National University and an LL.B. and LL.M. from Peking University, 2012 (“The ‘China threat’: a self-fulfilling prophecy,” *Knowledge, Desire and Power in Global Politics: Western Representations of China's Rise*, Published by Edward Elgar Publishing, ISBN 1782544240, p. 105-107)

The ‘China Threat’ Paradigm as a Self-Fulfilling Prophecy

If changing Chinese public opinion and Beijing's growing assertiveness in foreign policy are better understood in the context of mutual responsiveness, then threatening as they may appear, they at least partly reflect the self-fulfilling effect of the China threat theory as practice. That is, they are to some extent socially constructed by Western representations of the China threat. At this juncture, we may return to the question raised earlier—What's the cost of having an enemy? The cost, simply put, is that perceiving China as a threat and acting upon that perception help bring that feared China threat closer to reality. Though not an objective description of China, the 'China threat' paradigm is no mere fantasy, as it has the constitutive power to make its prediction come true. If this China paradigm ends up bearing some resemblance to Chinese reality, it is because the reality is itself partly constituted by it. With US strategic planners continuing to operate on the basis of the China threat, this self-fulfilling process has persisted to the present day. For example, in July 2010, when China objected to the joint US- South Korean navy exercise in the Yellow Sea to no avail, it announced that its navy would conduct live fire drills in the East China Sea for the duration of the US-South Korean manoeuvres. 329 Meanwhile. a Global Times (a Chinese daily tabloid affiliated with the official People’s Daily) editorial opines that 'Whatever harm the US military manoeuvre may have inflicted upon the mind of the Chinese, the United States will have to pay for it, sooner or later'. 130

All such Chinese 'belligerence' seems to have provided fresh evidence to the 'China threat' paradigm, whose image of China has now been vindicated. 131 Without acknowledging their own role in the production of the 'China threat', 'China threat' analysts thus play a key part in a spiral model [end page 105] of tit-for-tat in Sino-US relations. Mindful of this danger, some cool-headed observers have warned that a US attempt to build a missile defence shield could be reciprocated by China deploying more missiles. Even the highly classified US National Intelligence Estimate (NIE) report Foreign Responses to U.S. National Missile Defense Deployment has hinted at this possibility. 133 In early 2006, Mike Moore, contributing editor of The Bulletin of the Atomic Scientists, predicted that if the US continues to weaponise space by deploying a comprehensive space-control system, 'China will surely respond’.134 And respond it did. In early 2007, it launched a ballistic missile to destroy an inoperational weather satellite in orbit. That test immediately caused a stir in the international press, even though it came after Washington's repeated refusal to negotiate with China and Russia over their proposed ban on space weapons and the use of force against satellites. A Financial Times article noted that 'What is surprising about the Chinese test is that anyone was surprised'.135 In a similar vein but commenting on the broader pattern of US strategy on China over the years, Lampton notes that 'Washington cannot simply seek to strengthen ties with India, Japan, the Republic of Korea, and central Asian states as an explicit offset to rising Chinese power and then be surprised when Beijing plays the same game'.136

Nevertheless, such surprise is commonplace in the China watching community, reflecting an intellectual blindness to the self-fulfilling nature of one of its time-honoured paradigms. This blindness, in turn, allows the justification of more containment or hedging. In this way, the 'China threat' paradigm is not only self-fulfilling in practice, but also self-productive and self-perpetuating as a powerful mode of representation.

One might take comfort in the fact that neither Beijing nor Washington actually wants a direct military confrontation. But that is beside the point, for the lack of aggressive intention alone is no proven safe barrier to war. As in the cases of the Korean War and the Vietnam War, the outbreak of war does not necessarily require the intention to go to war. 137 Mutual suspicion, as US President Theodore Roosevelt once observed of the Kaiser and the English, is often all that is needed to set in motion a downward spiral.133 And thanks to the 'China threat' paradigm and its mirror image and practice from China, mutual suspicion and distrust has not been in short supply. 139 A war between these two great powers is not inevitable or even probable; the door for mutual engagement and cooperation remains wide open. Nevertheless, blind to its own self-fulfilling consequences, the 'China threat' paradigm, if left unexamined and unchecked, would make cooperation more difficult and conflict more likely.

It is worth adding that my treatment of Chinese nationalism and realpolitik thinking is not to downplay their potentially dangerous consequences, much less to justify them. Quite the contrary, for all the apparent legitimacy of [end page 106] reciprocal counter-violence or counter-hedging, Chinese mimicry is dangerous, as it would feed into this tit-for-tat vicious cycle and play its part in the escalation of a security dilemma between the US and China. Thus, to emphasise Chinese responsiveness is not to deny Chinese agency or exonerate its responsibility. While the general nature of Chinese foreign policy may be responsive with regard to the US, its 'contents' are not simply passive, innocent mimicry of US thinking and behaviour, but inevitably come with some 'Chinese characteristics'. That said, those 'Chinese characteristics' notwithstanding, there is no pregiven China threat both unresponsive to and immune from any external stimulus. To argue otherwise is to deny an important dimension of Chinese agency, namely, their response-ability.

By examining the self-fulfilling tendency of the 'China threat' paradigm, we can better understand that Sino-American relations, like international relations in general, are mutually responsive and constitutive. Thus, both China and the US should be held accountable to the bilateral relationship of their mutual making. To the extent that this 'China threat' knowledge often denies such mutuality, and by extension, US responsibility in the rise of the China threat, it is all the more imperative to lay bare its intrinsic link with power practice.

#### Third, the alternative is to give up attempts to know China. This requires abandoning the search for objective knowledge about China in favor of critical analysis of representations and discourse. This is a better methodology and framework.

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Among the most reported stories in the first decade of the twenty-first century, topping the list was not the global financial crisis, the long-running Iraq War, or even the 'September 11' terrorist attacks—it was the rise of China.1 These findings, announced by Global Language Monitor in 2011, were based on a study of global media reporting trends among 75000 print and electronic media sources. Were there a similar survey on the issues concerning the international scholarly community, China's rise would almost certainly rank among the most closely scrutinised as well. Long gone, it seems, are the days when an American publishing company did not publish a single book on China for fifteen years.2 With such extensive coverage on China's ascendancy today, there seems hardly a need for yet another study on this subject. Existing commentaries, books, and articles must have already covered a sufficiently wide range of perspectives.

Despite or precisely because of the vast amount of literature on this issue, I feel compelled to join the chorus. However, in doing so this book does not, as do many other books, seek to examine whether China is rising or not, or what its rise means. This is not because I believe such questions are unimportant or have already been settled; I do not. Rather, I believe what China's rise means cannot be independently assessed in isolation from what we already mean by China's rise. Though tautological it might sound, the latter question draws attention to the meaning-giving subject of China watchers. It turns the spotlight on our thoughts and representations of China's rise, which constitutes the main focus of this book.

Though it may appear that way in the eyes of some, going along this path is not a cunning attempt of finding a literary niche in an increasingly crowded field to score some cheap points all the while dodging the heavy lifting of tackling complex 'real-world' issues surrounding China. Nor is it to deliberately court controversy or strike an affected pose of malaise about an otherwise vibrant field of study. To me, this book is a necessary move justified on both theoretical and practical grounds. Theoretically, the book rejects the prevalent assumption about the dichotomy between reality and representation. Contra positivism, we cannot bypass thoughts and representations to come into direct contact with China as it is. What we see as 'China' cannot be detached from various discourses and representations of it. Works that purport to study China's rise, as if it were a transparent and empirically observable phenomenon out there, are always already inextricably enmeshed [end page vii] in representations. In all likelihood, those works will then become themselves part of such representations, through which still later studies will gaze at 'China'. In this sense, my focus on representation is less an expedient choice than ontological and epistemological necessity.

On practical grounds, given the inescapable immanence of representation and discourse in the social realm, a proper study of discursive representation is not a retreat from the real world but a genuine engagement with it in the full sense of the words. Perhaps with the exception of sleepwalking or unconscious twitching, no human action (let alone social action) can do without thought and representation. Constructivists are right in saying that words have consequences. But we may add that all social domains and human relationships are mediated through and constituted by thought and representation. China's relationship with the West is certainly no exception. With regional stability, prosperity and even world peace at stake, there is now an urgent, practical need to understand how the various strains of representation and discourse pervade and condition this critical and complex relationship.

For these reasons, this book turns to Western representations of China's rise. In particular, it focuses on two influential paradigms: the 'China threat' and the 'China opportunity'. Commonly held by their respective exponents as objective truth about the implications of China's rise, both paradigms, despite their seemingly contrasting views, are reflections of a certain Western self-imagination and its quest for certainty and identity in an inherently dynamic, volatile and uncertain world. While understandable, such a desire often proves elusive in the social world. With no lasting law-like certainty in sight, the desire for certainty then often comes full circle to two subsets of desire: namely, fears and fantasies. For these forms of desire can provide some emotional substitutes for the holy grail of certainty and truth. In this book, I will argue that the two China paradigms are, respectively, discursive embodiments of these two popular types of emotional substitutes. As such, they are not objective China knowledge, but are closely linked to habitual Western self-imagination and power practice. By probing into the interrelationship between knowledge, desire and power, the book aims to deconstruct contemporary Western representations of China's rise. Although it will tentatively point to some methodological openings for what one might call 'critical China watching', due to its scope and ontological stance as well as limits of space, it promises no ready-made alternative toolkit through which to better understand China as it is. Alas, the 'China as it is' simply does not exist except in our ingrained desire and conventional imagination.